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No. 171.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

A. Y. CHRISMAN et al.,

Plaintiffs in Error,

vs.

E. O. MILLER et al.,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

In Opposition to Dismiss or Affirm.

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The James H. Barry Co.

In the Supreme Court of the United States

A. Y. CHRISMAN, ET AL.,
Plaintiffs-in-Error,

vs.

E. O. MILLER, ET AL.,
Defendants-in-Error.

Brief for Plaintiffs-in-Error in Opposition to Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

June 14th, 1895, an association composed of Barieau, F. Barrett, Brown, McLean, Campbell, Bright, McClurg and H. Barrett, posted a notice of location on the northeast quarter of Section 20, Township 19 South, Range 15 East, Mount Diablo Base, in the State of California, claiming the same as a placer (oil) mining claim. (Record, p. 65.) At the time of location, petroleum was observed on this ground, oil mixed with water running out of a spring (p. 68). January 2d, 1896, the ground was surveyed and the boundaries marked (p. 65).

These locators, on the 24th of December, 1896, conveyed to the Producers and Consumers Oil Company, which in turn quitclaimed to the defendant-in-error, Miller, on the same day (p. 26). On the 29th of December, 1896, Miller executed a document by which he purported to "release, abandon, and re-" convey unto the United States of America, all right " in and to said land acquired under and by virute of " the location," made by Barieau and associates. This "abandonment" was recorded on December 31st, 1896, at *3 o'clock P. M.* (p. 44). On the *forenoon* of December 31st, 1896, Miller posted a notice of location of this ground on behalf of himself, W. Hall, L. Hall, Biddle, Hannah, Overall, Levinson and Smith, and marked the boundaries (pp. 39-41)..

January 1st, 1897, the plaintiff-in-error, H. T. Chrisman, posted notice of location on, and marked the boundaries of a portion of this quarter-section, (pp. 70-72), and the other plaintiff-in-error posted a notice upon, and marked the boundaries of another portion of the same (pp. 79-81). Before posting, they had discovered seepages of oil on the land (pp. 78 and 82).

July 31st, 1897, Miller's associates conveyed their interests under their location to him (p. 47). Miller subsequently leased to Barrett, who assigned to the Home Oil Company (p. 23). The Home Oil Company struck oil in September, 1897 (p. 60). This

was the first discovery of oil under the Miller location (pp. 24 and 25).

The action is to quiet title as against the Chrisman locations.

BRIEF OF ARGUMENT.

I.

IT APPEARS FROM THE RECORD THAT A FEDERAL QUESTION WAS PRESENTED FOR DECISION BY THE STATE COURT, THAT ITS DECISION WAS NECESSARY TO THE DETERMINATION OF THE CAUSE, AND THAT IT WAS ACTUALLY DECIDED AGAINST PLAINTIFFS-IN-ERROR, WHO CLAIMED A RIGHT UNDER THE FEDERAL LAWS.

In the state courts it was contended by these plaintiffs-in-error as is shown by the record:

First. That the "Barieau location" of June 14th, 1895, was valid, being distinctly marked on the ground so that its boundaries could be readily traced, and having been made after discovery of oil within its limits, and that it was existing on the 31st of December, 1896, when the "Miller location" was made;

Second. That the abandonment of the "Barieau location" by Miller, the grantee thereof, was of no avail to give the "Miller location" validity;

Third. That on January 1st, 1897, when the "Chrisman locations" were made, the land was free and open to exploration, and was a portion of the public domain of the United States;

Fourth. That the "Chrisman locations" were valid, being distinctly marked on the ground so that their boundaries could be readily traced, and having been made after discovery of oil within their limits; and

Fifth. That discovery of oil by Miller after conveyance to him by his associated locators, would not avail to perfect the location of more than twenty acres, which he as an individual claimant, was entitled to locate.

In reference to the Barieau location, the trial Court found:

"That on the 14th day of June, 1895, certain per-
"sons * * * *pretended to make*" upon the lands in controversy, "a mineral location" (p. 26), that certain of said persons "were not *citizens of the United* "*States,* nor were they, or either of them, qualified to "make a mineral location under the laws of the "United States and the laws of the State of Cali-"fornia, and said persons *did not in fact make said* "*mineral location*" (p. 27), and that these persons "did not on the 14th day of June, 1895, or on any day "whatsoever, *under and in pursuance of the laws* of "the United States, governing the locating and ap-"propriating of the mineral lands of the United "States, *locate* the lands and premises described in "plaintiffs' complaint or any part of said lands and "premises as a placer mining claim" (p. 29).

There is absolutely not a word of evidence as to the

political status of the persons whom the Court found were not citizens, but even if that finding were based on evidence, so far as this action is concerned, that fact could not have affected the validity of the location. As was said by the Circuit Court of Appeals in the Ninth Circuit in *Tornanses* vs. *Melsing* (109 Fed., 710): "The question whether or not a loca-" tion of a mining claim by an alien may be attacked " in a suit between private parties, has, whenever it " has arisen, been answered in the negative by the " decisions of the courts of the United States."

The evidence showed, without conflict, that June 14th, 1895, the Barieau association posted their notice, recorded the notice July 16th, 1895, and surveyed the land and marked the boundaries January 2nd, 1896, and that during this time no outside rights intervened (pp. 64-66, 67-68, 52-55).

There is but one element left which could have affected the validity of this location—that is to say, discovery. The facts which plaintiffs-in-error contend constituted a discovery are undisputed. Barieau testified: "I saw some indications of oil on this " northeast quarter in 1895, in June, and frequently " since. * * It comes out with the water, floats " on the water. There is a permanent spring there, " especially in the summer when it is hot. The oil " runs there in the summer. * * In June, 1895, there " was a little water with oil, and a little oil with water " coming out" (p. 68). *This evidence was not con-*

tradicted. In plaintiff's case in rebuttal, the witness Doheny testified that he had examined the land in April, *1899—almost four years after this location*—sufficiently to satisfy himself that "there was not any oil in the soil" (p. 97); the witness Poston testified that in July and August, *1898,* he saw no indications of oil in the vicinity (p. 98), and the witness Chandler testified that in April, *1899,* while he was on the land, *not looking for oil, but for water,* he did not see any signs of oil (p. 99). The observations of these witnesses, it must be remembered, were made after the Home Oil Co. had bored its wells and pumped oil out of this quarter section. This would naturally tend to diminish the pressure in natural wells. The Supreme Court of the State also held that the evidence of discovery was uncontradicted: "*Upon the* "*question of discovery the sole evidence is that of* "*Barieau himself*" (p. 122).

The facts being uncontradicted, there was left to the Court's determination a pure question of law: Did these facts constitute a discovery within the meaning of the federal statute? And the Court determined that they did not.

It is to be noticed that the Court's decision of this question, though placed among the findings of fact, is throughout, a conclusion of law; thus, they "pre-" tended to make a location"; "nor were they quali-" fied to make a location" and "did not * * under " and in pursuance of the laws of the United States,

"locate the land." There is no finding of what they did, but the legal conclusion that their acts resulted in an invalid location.

The Court, in holding the location to be invalid, necessarily decided as did the Supreme Court, that such seepage of oil was not a discovery within the meaning of the statute.

But this was purely a federal question; it involved the construction of a federal statute under which these plaintiffs-in-error asserted their right, and the question was determined against them. There was "drawn in question the validity of * * an au-"thority exercised under the United States," and the decision was against the validity.

In *Nevada Sierra Oil Co.* vs. *Miller,* 97 Fed., 681, 688, His Honor, Judge Ross, said: "According to "the averments of this bill, there lies, at the very "foundation of the case, the question as to whether "there was a discovery of any mineral deposit, with-"in the limits of the claim in controversy, prior to its "location by the predecessors in interest of the com-"plainant. (Rev. St., Sections 2320, 2329.) With-"out a valid discovery of mineral within the limits "of the claim, there could be no valid location of the "ground as a placer mining claim. That is clear, "and no one, I apprehend, will dispute it. That "question, therefore, not only enters into the essence "of the complainant's cause of action, but constitutes "its foundation stone. The facts constituting the al-

"leged discovery are stated at large in the present "bill. The statute authorizing the location of a "placer *mining* claim upon the public land, after "discovery of a mineral deposit within its limits, "does not declare what shall constitute a discovery. "Whether or not the finding of seepages of oil, and "its residuum, upon a given piece of public land and "upon the lands adjoining it on different sides, and "the finding thereon of shale and oil-bearing sand "rock of a character similar to that in which petro-"leum in large and paying quantities had been found "and developed in the vicinity, which veins and "strata extend to and across the ground in question, "manifestly depends upon the application and true "construction of the laws of the United States."

Furthermore, the decision of the entire case hung upon this question. If Barieau's discovery was sufficient, that location was good. The Miller location was made *before* the Barieau location was abandoned (Finding XXXIV, p. 30)—conceding for the present that an abandonment prior to the Miller location could have been effective. If Barieau's discovery were sufficient, Miller's location was void in its inception and could never have been validated by subsequent acts. "A location, to be good, must be good "when made." (Snyder on Mines, Sec. 156). If the Miller location were void, the Chrisman locations were good, and the case was on all fours with *Belk* vs. *Meagher,* 104 U. S., 279. We quote the facts

from the syllabus: "A. entered Dec. 19, 1876, upon "a claim not then in the actual possession of any one, "but covered by a valid and subsisting location "which did not expire until the first day of Janu- "ary thereafter. Between the date of his entry and "February 21, 1877, he made no improvements or "enclosure, and did a very small amount of work, "but had no other title than such as arose from his "attempted location of the claim and his occasional "labor upon it. On the last-mentioned date, B. en- "tered upon the property peaceably and in good "faith, and did all that was required to protect his "right to the exclusive possession thereof. A. "brought ejectment."

This Court say: "Mining claims are not open to "re-location until the rights of a former locator have "come to an end. A re-locator seeks to avail him- "self of mineral in the public lands which another "has discovered. This he cannot do until the dis- "coverer has in law abandoned his claim, and left "the property open for another to take up. The "right of location upon the mineral lands of the "United States is a privilege granted by Congress, "but it can only be exercised within the limits pre- "scribed by the grant. A location can only be made "where the law allows it to be done. Any attempt "to go beyond that will be of no avail. Hence, a "re-location on lands actually covered at the time by "another valid and subsisting location is void; and

" this not only against the prior locator, but all the " world, because the law allows no such thing to be " done. It follows that the re-location of Belk was " invalid at the time it was made, and continued to " be so until January 1, 1877. The next inquiry is, " whether the attempted location in December be- " came operative on the first of January, so as to give " Belk the exclusive right to the possession and en- " joyment of the claim after that. We think it did " not. The right to the possession comes only from " a valid location. Consequently, if there is no loca- " tion, there can be no possession under it."

In regard to the Chrisman locations, the Court found: "That said defendant, A. Y. Chrisman, never " at any time discovered a seepage of petroleum or " other mineral oil upon said land or any part there- " of, and the defendant, H. T. Chrisman, never dis- " covered a seepage of petroleum or other mineral oil " upon said land or upon any part thereof" (p. 25), but this finding is not supported by the evidence. H. T. Chrisman testified: "Q. Well, did you make " any search before placing this notice up there for " any evidences of mineral, petroleum or oil? A. " It wasn't necessary. As soon as I went there, I saw " some. Q. Where did you see it? A. On the " southeast corner of the northeast quarter. On my " claim. Q. Have you ever searched on the claim " known as your father's (A. Y. Chrisman, see p. 79) " claim, whether there was anything discovered there

"or not? A. I have looked over it lots of times, "but long before that time. There is one place up "there where the oil is almost oozing out of the "rocks; looks very oily; nearest prospect of oil I "have ever seen there" (p. 75). A. Y. Chrisman testified: "Before placing the notice there, 'mining "location,' I made an examination as to the presence "of any petroleum or oil on these two claims. Near "the east line of the northeast quarter there is a gulch "comes down there, and a little oil seeps out with the "water and comes out in that gulch there; in relation "to my boy's claim, that would be just inside the "southeast corner of his claim; would be on his "claim. I made a discovery on my claim near the "north line, inside of my claim, in January, 1897, "after I had posted the notice; before I had posted "my notice, I noticed strong evidences of oil there "on my claim, black shale cropping out in places" (p. 82). The only evidence in rebuttal is that already quoted of the witnesses Doheny, Poston and Chandler, all to the effect that *they saw no signs* of oil at times far distant from the time of these locations, and, as we have already shown, after the pressure in this natural spring had been lessened.

Counsel for defendants-in-error contends that these findings must be conclusive on this Court on writ of error. But findings are conclusive only when the evidence is conflicting, not when there is a total failure of evidence to sustain them.

See:

Laing vs. *Rigney*, 100 U. S., 531, 540.
Ward vs. *Joslin*, 186 U. S., 142.
Dooley vs. *Pease*, 180 U. S., 126.
Runkle vs. *Burnham*, 153 U. S., 210.
Case Mfg. Co. vs. *Soxman*, 138 U. S., 431.
Hathaway vs. *Bank*, 134 U. S., 494.
Lehnen vs. *Dickson*, 148 U. S., 71.
The Francis Wright, 105 U. S., 381.
Eastman vs. *Currey*, 48 Pac., 310.

There is no conflict in the evidence that the Chrismans posted and recorded their notices and marked the boundaries of their locations, or that they performed the annual assessment work (pp. 70-75, 79-82, 86-87), consequently the XVIIIth finding (p. 25) is not sustained by the evidence.

The trial Court held both the Barieau and the Chrisman locations invalid only by reason of the insufficiency of the discovery. This insufficiency was not a question of fact, but one of law.

Counsel for defendant-in-error seems to be of opinion that the federal question must be presented in the State Court in some solemn and formal manner, which must appear in the record. Such is not the law as enunciated by this Court. It is sufficient if it appears that a determination of such question was necessarily made in the Court's decision.

"This Court has had frequent occasion to hold

"that it is not always necessary that the federal ques-
"tion should appear affirmatively on the record or
"in the opinion if an adjudication of such question
"was necessarily involved in the disposition of the
"case by the State Court."

Kaukauna Co. vs. *Green Bay, etc., Canal,* 142 U. S., 254, 269.

Citing:

Armstrong vs. *Athens County,* 10 Pet., 281.
Willson vs. *Blackbird Creek Marsh Co.,* 2 Pet., 245.
Chicago Life Ins. Co. vs. *Needles,* 113 U. S., 574.
Eureka Lake Co. vs. *Yuba County,* 116 U. S., 410.

But it formally appears in the record that the federal question was raised in and decided by the State Court. In the opinion, it is said: "The two require-
"ments admittedly essential to the validity of a loca-
"tion such as this, are that the location must be dis-
"tinctly marked upon the ground so that the boun-
"daries can be readily traced, and that there must be
"a discovery of minerals within the limits of the
"land located (Rev. Stat. U. S., Sec. 2324). *Upon*
"*the question of discovery the sole evidence is that of*
"*Barieau himself.* * * *We think it clear that such*
"*testimony does not establish a discovery within the*

" *meaning of the law.* To constitute a discovery, the " law requires something more than a conjecture, ex- " pectation, hope or even indications" (p. 122).

As was said by this Court in *Republican River Bridge Co.* vs. *Kansas Pacific Ry. Co.* (92 U. S., 315): "When a right is set up under an Act of Con- " gress in a State Court, any matter of law found in " the record, decided by the highest Court of the " State, bearing on the right so set up under the Act " of Congress, can be re-examined here."

If the validity of the Barieau location was not essential to the Court's decision, it was so only by reason of the abandonment of that location by Miller, the transferee. But in that case the effect of the abandonment—itself a federal question—must have been determined.

Another federal question was necessarily involved in the determination of this cause and was decided against plaintiffs-in-error, that is to say, that the conveyance to Miller, by his associated locators, made prior to discovery, vested no title in him; that subsequent discovery by him could have served to perfect only such location as he could have made as an individual, viz., twenty acres, and that the one hundred and sixty-acre tract never having been subdivided, it was impossible for him to perfect an undivided interest in the association claim.

The Court must have necessarily held that plaintiffs' title was derived from this location, and that

the location was perfected when, subsequent to conveyance to Miller, discovery was made. The cause could not have been decided without a determination of this question.

That this question was urged and determined adversely to plaintiffs-in-error, appears from the opinion of the State Supreme Court (p. 126). It was by reason of the existence of this question that the Chief Justice dissented from the order denying a rehearing (p. 128).

Counsel for defendants in error, however, urges that this question was presented solely by the intervenor in the State Court; that the intervenor is not a plaintiff in error here, and that consequently these plaintiffs in error cannot raise the question in this Court.

This contention is not true in fact. The question was presented on argument to the State Supreme Court as appears from page 13 of the printed "Argument of Mr. Metson on behalf of Appellants," of which a duly authenticated copy is herewith presented.

But, even it if were true, the State statute permitting interventions (California Code of Civil Procedure, Sec. 387) provides that "Any person may be-
"fore the trial, intervene in an action or proceeding,
"who has an interest in the matter in litigation, in
"the success of either of the parties, or an interest
"against both. An intervention takes place when

" a third person is permitted to become a party to an " action or proceeding between other persons, either " by joining the plaintiff in claiming what is sought " by the complaint, or by *uniting with the defendants* " *in resisting the claims of the plaintiff.*"

In resisting the claims of the plaintiffs below, the intervenor united with defendants in that Court, these plaintiffs in error. In the attack on the Miller location, defendants and intervenor made common cause. The question which, it appears in the Supreme Court's opinion was raised by the intervenor, was raised for the benefit of both and its decision was essential to a determination of the rights of both. These plaintiffs in error are certainly not estopped to present the question in this Court because they relied on its presentation by a party united with them in interest in the State Court.

In concluding this point, we submit that the following federal questions, arising on a construction of the United States Statutes, were necessarily involved in the determination of this cause, and were decided against these plaintiffs-in-error:

First. Whether or not a discovery of a seepage of oil is a discovery within the meaning of Sections 2320 and 2329 of the Revised Statutes, that "No location " of a mining claim shall be made until the discovery " of the vein or lode within the limits of the claim " located," and "Claims usually called 'placers' * *

"shall be subject to entry * * under like circum-
"stances and conditions * * as are provided for
"vein or lode claims;" or,

Second. Whether or not, upon failure to do the annual labor, required by Section 2324, the locator may abandon with intention of relocation, and after relocation be protected in the possession of his claim, under the provisions of Section 2322, that "The loca-
"tors of all mining locations * * so long as they
"comply with the laws of the United States * *
"shall have the exclusive right of possession and en-
"joyment;"

Third. Whether or not the Miller location was "made," or perfected, or whether or not it vested any right, title or interest in the locators, prior to the discovery of oil on the claim, under the provision of Section 2320, that "No location of a mining claim "shall be *made until discovery";*

Fourth. Whether or not the Miller location, when "made" or perfected by discovery, would give possessory title to more than twenty acres under the provisions of section 2331, that "No such location shall "include more than twenty acres for each individual "claimant."

II.

THE STATE COURT DID NOT DECIDE THE CASE ON OTHER GROUNDS THAN THOSE INVOLVING A FEDERAL QUESTION.

Counsel for defendants in error, in his endeavor to make it appear that there are grounds for the decision which do not involve a federal question, contends that the Miller association was in possession on January 1st, 1897, and that the entry of the Chrismans on such possession was clandestine and surreptitious, and that a valid location could not find its inception in such an entry.

The trial Court did not find as counsel asserts "that when they (the Chrismans) attempted to make "their locations, the land was *in the actual occu-* "*pancy and possession* of the defendants in error." It found, "that on the said first day of January, 1897, "no part of the said northeast quarter of Section 20 "was vacant, public mineral land or open to explora- "tion or location for mining purposes, but, on the con- "trary, the whole of said northeast quarter of said "Section 20 *was then in the possession of"* the Miller association, *"under and by virtue of their location* "of said land hereinbefore mentioned" (p. 25). But this is purely a conclusion of law, that *by virtue of their location they were in possession.* The evidence shows nothing further. It shows, as we have already pointed out, that on December 31st, 1896, Miller

posted the notice and marked the boundaries, and it also affirmatively shows that nothing further was done until the July following (pp. 42, 60).

There is absolutely not a particle of evidence showing *occupancy* by the Miller association on the first day of January, 1897, irrespective of the boundary markings; but, on the other hand, there is uncontradicted evidence that the Chrismans were constantly in actual occupation of and working the two claims from the time of their location, and from November, 1898, were living on them in a house which they had erected (pp. 62, 75, 82). If the location were valid, undoubtedly that association was in possession; if it were invalid, it had no possession. The finding of possession is necessarily premised on the validity of the location, and has no broader scope than such validity. There is no *pedis possessio* shown. While we admit that one may not surreptitiously or forcibly oust one in actual physical, though unauthorized, occupancy, in order to make location, the rule has no bearing on the instant case, for no such occupation is shown.

In *Funk* vs. *Sterrett* (59 Cal., 613), it is said: "The "Act of Congress in question provides (Sec. 2324, "R. S.) that, 'the location must be distinctly marked "'on the ground, so that its boundaries can be readily "'traced.' Since the passage of that Act, a party "can show a right to the possession of a mining "claim (when no patent has been issued) only by

"showing an actual *pedis possessio,* as against a "mere wrongdoer, or by showing a compliance with "the requisites of the Act of Congress. There is no "pretense of any actual possession of the whole claim "other than by compliance with the Act. The true "questions for decision, therefore, were: which party "had complied with the requirements of the law, and "was prior in time; not which, 'on the whole, had "'the better right.'"

See, also:

English vs. *Johnson,* 17 Cal., 108.

Nor is there any evidence or finding that the Chrisman entry was clandestine or surreptitious. It is true they posted their notice shortly after midnight, but not by reason of any malign or clandestine motive. They believed, and rightly as we contend, that the Barieau location would expire at midnight, December 31, 1896, and that the land would become open to location. Promtply after that hour they availed themselves of their rights, acting as soon as the law empowered them to locate.

Nor, even if the Court had decided this case upon the ground that the inception of the Chrisman location was in a surreptitious and clandestine entry on Miller's occupation, and that therefore they were invalid, could it have so decided without a prior determination of the last stated federal question, for

granting that the *pedis possessio* of one claiming mining ground embraces all the land within the marked boundaries, yet that rule applies only when the ground claimed is of such size as law or local custom allow to a claim (*English* vs. *Johnson, supra*). If by reason of the conveyance to Miller by his associated locators, the right to perfect location of more than twenty acres was lost, it follows that his *pedis possessio* could embrace no more than twenty acres.

What title these defendants in error possess and which they are endeavoring to quiet could be to twenty acres only, but such twenty acres could not conflict with the Chrisman locations. Those locations are the south halves of the two lower quarters of the quarter section (pp. 72, 80), while all the wells and works are above these locations (p. 95a). Under Section 2331 of the Revised Statutes such twenty acres would have to conform to the rectangular subdivisions of the United States land survey, consequently no twenty-acre claim upon which work was being done by the Home Oil Company could be below a line drawn east and west through the middle of the lower quarters of this quarter-section, which line is the north boundary of the Chrisman locations (pp. 95a and 98a).

In concluding our argument, we beg to submit, that on this motion the merits of the cause can not be inquired into or decided. We have endeavored to present to the Court the nature of the federal ques-

tions raised in the State Court and to show that they were decided there against these plaintiffs in error. The merits of those questions we have not touched on at this time. They are fully and exhaustively presented in our brief now on file, and their discussion at this time would serve only to confuse.

In the premises, it is most respectfully submitted that the motions to dismiss or affirm be denied.

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